

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**JANET WINSLOW PETERSON AND
LINDA WINSLOW LAMBRIGHT**

APPELLANTS,

**v.
PROGRESSIVE CONTRACTORS,
INC., et al.**

RESPONDENTS.

DOCKET NUMBER WD74550

DATE: May 21, 2013

Appeal From:

Buchanan County Circuit Court
The Honorable Patrick K. Robb, Judge

Appellate Judges:

Division Three: Joseph M. Ellis, Presiding Judge, Lisa White Hardwick, Judge and Cynthia L. Martin, Judge

Attorneys:

Edwin H. Smith, St. Joseph, MO, for appellants.

T. Michael Ward and Teresa M. Young, St. Louis, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

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APPELLANTS,

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Before Division Three: Joseph M. Ellis, Presiding Judge, Lisa White Hardwick, Judge and Cynthia L. Martin, Judge

Janet Winslow Peterson and Linda Winslow Lambright appeal from the entry of judgment following a jury trial in favor of Progressive Contractors, Inc. and Highway Technologies, Inc. on their claims for personal injuries and for wrongful death. Appellants claim the trial court erroneously overruled an objection to closing arguments made by Respondents that each implemented traffic control and safety measures in a highway construction work zone in the manner directed by the Missouri Highways and Transportation Commission. Appellants claim the closing arguments misled the jury by suggesting the Respondents owed no duty to Appellants beyond the duty to perform their contracts. Appellants also claim the trial court erroneously excluded hearsay testimony about a statement made by PCI's job foreman because the statement was an admission against PCI's interest.

AFFIRMED

Division Three holds:

1. A trial court's rulings on objections made to remarks by counsel during closing argument are reviewed for abuse of discretion.
2. Reversal of a trial court's ruling during closing argument is only warranted on properly preserved claims of error where such an abuse of discretion has occurred as to render it probable that the jury was influenced in the rendition of its verdict.
3. Where Appellants failed to object to several potentially offending portions of one of the Respondent's closing arguments until a break taken during the proceedings by the trial court, and never objected during the closing argument of the other Respondent, Appellants failed to properly preserve a claim of error relating to the closing arguments.
4. Appellants are not entitled to plain error review of the allegedly erroneous closing arguments because (i) the jury was properly instructed and we assume the jury followed the instructions; (ii) Respondents' arguments were invited by Appellants' evidence; and (iii)

Respondents' arguments were fair comment on an element instructed other than the Respondents' duty of care.

5. A trial court enjoys considerable discretion in the admission or exclusion of evidence and absent clear abuse of discretion, its actions will not be reversed.

6. An admission of an employee is admissible against the interests of his employer if the statement is relevant to the issues involved and the employee, in making the statement, is acting within the scope of his authority.

7. It is the subject matter of an employee's statement, and not the relationship with the person who overhears the statement or the circumstances giving rise to the conversation, which must be within the scope of the employee's duties.

8. In the absence of evidence that a job foreman had the responsibility to communicate with police about his concerns that motorists were driving through wet concrete on a construction site, trial court did not abuse its discretion in excluding foreman's statement to a family member of the Appellants as hearsay.

9. Other evidence essential to establishing the logical relevance of the job foreman's statement was not introduced, leading to the conclusion that the hearsay statement would otherwise have failed to qualify as an admissible admission against interest.

Opinion by Cynthia L. Martin, Judge

May 21, 2013

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